Supreme Court, U.S.
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No. 01-69

In The
**Supreme Court of the United States**

GEORGE L. GAUNT and THE CENTER FOR REPRODUCTIVE MEDICINE, P.A.,
Petitioners,

vs.

DONALD E. PITTAWAY, JACK L. CRAIN, DANIEL B. WHITESIDES, RICHARD L. WING, CAROLYN B. COULAM, MORGAN D. GAINOR, CHARLES J. GAINOR and THE NALLE CLINIC,
Respondents.

**Petition for a Writ of Certiorari to the North Carolina Court of Appeals**

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# PETITIONERS' REPLY BRIEF

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## INTRODUCTION

For reasons that are not accidental, respondents have, through their Brief in Opposition ("Brief"), virtually ignored the arguments made by petitioners in their Petition for Certiorari ("Petition"). Respondents have not, and indeed cannot, deny that the Record is replete with accusations that petitioner George L. Gaunt ("Dr. Gaunt") is a "child molester," a taker of "kickbacks," and so forth. See Supreme Court Rule 15(2) (requiring respondents to point out, in their Brief, any misstatements in the Petition). Instead, respondents spuriously claim that their unvarnished personal attacks should simply be brushed aside.

## RESPONDENTS' PROCEDURAL ARGUMENTS ARE MERITLESS

Respondents begin their brief by raising several plainly ridiculous objections. Respondents first assert that petitioners have failed to identify "when the federal questions sought to be reviewed were raised." The very first interior page of petitioners' Petition, entitled "Questions Presented," plainly indicates that "federal" questions were raised by respondents in their motions for partial summary judgment and summary judgment. The Petition, at pages 5, 7, 14 and elsewhere, further describes where and how the issues presented were preserved for appeal.

Respondents then claim that "[n]o Federal issue was raised in the Complaint or other pleadings filed . . . nor was one raised in the Assignments of Error [to the North Carolina Court of Appeals]." Respondent Pittaway must have forgotten that his Answer stated, as his Seventh Defense, that "if any statements made by defendant were defamatory and otherwise actionable, such statements were protected by the constitutional First Amendment privilege inasmuch as plaintiffs are public figures . . . ." Rp. 167. Similarly, respondents Crain, Whitesides, Wing, and the

Nalle Clinic, all of whom appear to be suffering memory lapses, also claimed in their Answer that "plaintiffs by their activities and in particular their advertising had become public figures . . . and the statements attributed to these defendants were privileged under the First and Fourteenth Amendments to the United States Constitution." Rp. 125. Under North Carolina's civil rules, an Answer is most certainly a pleading. See N.C.R. Civ. P. 7(a).[1]

Respondents then contend, that insofar as the limited purpose public figure question is concerned, "the courts in North Carolina resolved this matter on independent state grounds . . . precluding review by this court under Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L. Ed. 2d. 1201 (1983)." Brief at 2. The trial court's orders on the public figure issue were explicitly premised on federal constitutional grounds. See Petition, App. C at 19a-21a. The case cited by respondents on this score is Taylor v. Greensboro News Co., 57 N.C. App. 426, 435-36, 291 S.E.2d 852, 857 (1982), appeal dismissed, 307 N.C. 459, 298 S.E.2d 385 (1983). Respondents fail to reveal that the Gaunt II Court credits the Taylor decision as "adopting language of the United States Supreme Court in Curtis Publishing Co. [v. Butts, 388 U.S. 130 (1967)]." Gaunt II, 139 N.C. App. 778, 786, 534 S.E.2d 660, 665 (2000).[2] More incredibly, at page 3 of

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1 And, despite respondents' contrary representation to this Court, petitioners' Fifth Assignment of Error to the North Carolina Court of Appeals plainly stated "that the Court improperly applied the law to the relevant, admissible and material facts concerning the public figure issue." Rp. 326. Petitioners' Sixth Assignment of Error addressed "constitutional [actual] malice." Rp. 327. Respondents have simply misrepresented these matters to this Court.

2 Respondents also fail to reveal that Taylor relied exclusively on opinions of this Court to ultimately conclude that the "New York Times standard of liability clearly applied to plaintiff." Taylor, 57 N.C. App. at

their Brief, respondents contend that the "statements allegedly made by the respondents in their meetings with Garloch . . . which were not set forth in the Complaint, should not be considered on appeal." (Citing Stutts v. Duke Power Co., 47 N.C. App. 76, 266 S.E.2d 861 (1980)). The order which granted partial summary judgment to respondents reveals that the trial court considered "the affidavits filed on behalf of the plaintiffs and defendants, the discovery responses and deposition transcripts filed with the Court." Petition, App. C at 19a-21a. The materials before the trial court contained all of the statements discussed in both parties' briefs to this Court.

Stutts, the case cited by respondents in their effort to have this Court disregard inconvenient evidence, concerned the standards applicable to a motion to dismiss, not those applicable to summary judgment. Stutts, 47 N.C. App. at 84, 266 S.E.2d at 866. The public figure question at issue was decided at summary judgment, through a test of the evidence, not the Complaint. And, to state the obvious, many of the statements made by respondents to The Charlotte Observer were unknown until discovery began. Once the notes of reporter Garloch were produced in discovery (quoting respondents in hundreds of pages of interviews), summary judgment became a test of that evidence. See N.C.R. Civ. P. 56(c). [3]

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435-36, 291 S.E.2d at 857. In addition, it is noteworthy that a nearly identical "adequate and independent state grounds" argument was summarily rejected in Milkovich v. Lorain Journal Co., 497 U.S. 1, 9-10 n.5 (1990).

3 Cf. Whitten v. King's AMC/Jeep, Inc., 292 N.C. 84, 90, 231 S.E.2d 891, 894 (1977)(at summary judgment, it is desirable to treat the complaint as though it were amended to conform to the evidence presented at the hearing); Hardison v. Williams, 21 N.C. App. 670, 673, 205 S.E. 2d 551, 553 (1974) ("[t]o grant summary judgment for variance

## THE LOWER COURTS HAVE IMPROPERLY APPLIED THE SUMMARY JUDGMENT STANDARD.

The court in Harris v. Tomczak, 94 F.R.D. 687, 692 (E.D. Cal. 1982) described jurisdictions nationwide as "in profound disarray" about the proper application of summary judgment standards to the limited purpose public figure determination. Too often the determination of limited purpose public figure status has become a docket clearing mechanism achieved through the lazy application of First Amendment principles. Petitioners submit that this is exactly what occurred here.

Even accepting that a public controversy existed regarding "infertility medicine" in general, or "infertility credentials" specifically, these issues had no plausible connection to accusations such as "child molester." At pages 12-13 (footnote 4) of their Brief, respondents cite the Court to several occasions where Dr. Gaunt appeared in the local Charlotte media. Respondents do not inform the Court, though, that no "credentials" debate was ever raised by anyone during these appearances. The University of North Carolina at Charlotte News article cited by respondents is reproduced at Appendix page 19a; as this Court can observe, the article depicts Dr. Gaunt presenting a $300 scholarship to a local nursing student. The Greensboro News and Record article cited by respondents doesn't even mention Dr.

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between allegation and proof would subvert Rule 15(b) of the North Carolina Rules of Civil Procedure"). In sum, it is beyond dispute that the entirety of the Record was required to be and was considered by the trial court. The point of this appeal is that the lower courts improperly applied summary judgment standards and failed to properly account for the evidence in the Record.

Gaunt.[4] Respondents have merely lumped together every occasion where Dr. Gaunt wrote a letter to the editor, appeared on a call-in radio show or discussed the successes of his clinic with the local newspaper. Respondents have not demonstrated that Dr. Gaunt's media appearances were even tangentially connected to a so-called "infertility controversy." Respondents have not made the attempt because it could not be made in good faith. Instead respondents cite a vague list and call it probative of the matter at hand. It is not.

## MATERIAL DISPUTES EXIST PRECLUDING SUMMARY JUDGMENT

Respondents' historical approach toward presenting the Record to the lower courts has worked well enough that it has continued here unabated. In their effort here, respondents assert that petitioners' own expert, Howard Jones, M.D. ("Dr. Jones"), claimed that Dr. Gaunt and his clinic did not meet the minimal standards of a fertility practitioner. See Brief, p. 12. In fact the opposite is true.[5]

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4 Each of the articles or media appearances cited by respondents suffers from identical analytical defects. At Appendix pages 12a-19a, other examples of respondents' partial summary judgment evidence is reproduced.

5 Dr. Jones actually testified as follows:

> Q. And let me ask you this last question relating to that. Do you have an opinion, Doctor Jones, as to whether Dr. Gaunt in 1986-1991 had the medical training to make decisions on the course of treatment for infertility patients under his care at the Center for Reproductive Medicine?
>
> A. Yes, Sir.
>
> Q. And the basis for that opinion?

Likewise, respondents have also made the startling assertion that petitioner's former public relations agent, William Ballenger, testified that "he found nothing inaccurate in the article." Brief, p. 15. In fact, he testified to the exact opposite.[6] These factual disagreements matter, of course, because the case was dismissed through summary judgment. If the basic facts presented at summary judgment conflict so unequivocally, dismissal could not have been proper.

Insofar as the public figure question is concerned, the following things can be flatly said. Dr. Gaunt never appeared in any public forum to argue about the validity of his credentials, and his efforts to track certain legislative efforts received no public attention whatsoever.[7] These

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A. Would be the same as I have answered the other similar questions.

(Jones dep. pp. 263-64; Rp. 275.)

6 William Ballenger actually testified as follows:

Q. And what would that impression [of the Story] be, in your view?

A. That impression would be that the Center was not good at what it did, and, in fact, was damaging to some people, that most would be just like these that are depicted over three columns of page 1.

Q. Did you feel that was incorrect?

A. I did.

(Ballenger dep. p. 277; Rp. 267.)

7 Respondents contend that "Gaunt's activities far exceed those of other plaintiffs . . . found by the Courts to be public figures." Brief, p. 14. The cases cited by respondents in support of this argument are, however, patently inapposite. In Suriano v. Gaughan, 198 W.Va 339, 347 n.10, 480

assertions were made in the Petition, and respondents have not disputed them.

In their Brief, at page 10, respondents point this Court to numerous publications they claim established an infertility controversy as of the date of the Story, i.e., September 15, 1991. None of these articles mention petitioners, and no less than six of the publications cited by respondents post-date September 15, 1991 (one by three years). This important information was omitted from respondents' arguments.[8] Again, though, respondents have

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S.E.2d 548, 557 n.10 (1996), for instance, the plaintiff's writings about the controversy had been published in newspapers and medical journals. None of Dr. Gaunt's letters to legislators and the like were ever seen by anyone other than their recipients. Dr. Gaunt's two letters to the editor of The Charlotte Observer, the only letters ever published, put forward by respondent's as evidence, were entitled "Right To Smoke Harms Others" and "Reproductive Morality - Perhaps God Works Through Modern Medicine." Neither addressed credentials issues at all. Likewise, Dr. Gaunt has never provided any testimony to any governmental body, ever. Thus, McBride v. Merrell Dow and Pharmaceuticals, Inc., 613 F.Supp. 1349, 1353-34 (D.D.C. 1985) aff'd in part, rev'd in part, 800 F.2d,1208 (D.C. Cir. 1986), is malapropos, since the plaintiff there testified before governmental hearings as an expert on the controversy at issue, and was a public figure as a result. In Park v. Capital Cities, 181 A.D.2d 192, 194 (N.Y. Sup. Ct. 1992), the controversy was about cataract surgery and the plaintiff doctor had asked television stations to do a broadcast on that very topic. And, in Cera v. Gannett Co., Inc., 47 A.D. 2d 797 (N.Y. Sup. Ct. 1975), the plaintiffs "concede[d] that they had thrust themselves to the forefront of the particular public controversy." Needless to say, the instant petitioners conceded nothing of the sort. The discordance between the cases cited by respondents and the facts of the instant case highlight the infirmity of the limited purpose public figure determination made below.

8 Los Angeles Times (Ep. 9586-92) date of publication October 6, 1991; Time (Ep. 9593-9600) date of publication September 30, 1991; New York Times (Ep. 9601-08) date of publication March 15, 1992; Newsweek (Ep. 9609-10) date of publication June 29, 1992; The Virginia-Pilot and The Ledger-Star (Ep. 9611-17) date of publication March 28, 1993; U.S. News

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merely selected examples of media coverage, and listed them *ad nauseam*, as if their mere existence proves the contours of a relevant controversy. The Gaunt II Court echoed the error, stating that these publications established "an important public controversy . . . at the time of The Charlotte Observer news article." Gaunt II, 139 N.C. App. at 786, 534 S.E.2d at 665. The facts of record do not square with this assertion. Such errors solidify the proposition that no careful review of the Record occurred below, and that summary judgment standards were either misunderstood or improperly applied.

## THE ACTUAL MALICE STANDARD WAS IMPROPERLY APPLIED AT SUMMARY JUDGMENT

This Court has defined actual malice in First Amendment cases as publication of a statement with knowledge that it was false or with reckless disregard as to whether it was false. New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). The Court has made clear that the defendant must have made the false publication "with a high degree of awareness of . . . probable falsity," Garrison v. Louisiana, 379 U.S. 64, 74 (1964), or must have entertained serious doubts as to the truth of its publication. St. Amant v. Thompson, 390 U.S. 727, 731 (1968). In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

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and World Report (Ep. 9618-24) date of publication December 5, 1994. See Petition, App. E at 35a–44a, for a list of the evidence before the trial court on the public figure question.

The record is replete with evidence showing "actual malice" on the part of the respondents.[9] Reporter Garloch's notes document that respondent Crain told her that Dr. Gaunt "never graduated." App. at 1a. At his deposition, though, respondent Crain first denied the statement and then admitted that he had seen Dr. Gaunt's diploma on the wall. Respondent Crain also told reporter Garloch that Dr. Gaunt had been "kicked out of [a] path[ology] resid[ency] at the Mayo Clinic." App. at 7a, 6a. Reporter Garloch confirmed for herself that this accusation was false. Id.

These comments pale in comparison to the criminal acts respondents alleged that Dr. Gaunt committed. Respondent Crain told reporter Garloch that Dr. Gaunt was responsible for a "dead cat" and that he was a "child molester." App. at 1a. Respondent Crain also called Dr. Gaunt the "Jim Bakker of medicine" and an "absolute criminal." App. at 8a-9a. Yet, when asked under oath if he had told reporter Garloch that Dr. Gaunt had engaged in any criminal activity or fraud, respondent Crain both denied making such a claim and then stated that he could not recall having done so. App. at 3a-5a. Importantly, when asked, respondent Crain could not assert that these statements were true.

In Harte-Hanks, this Court held that "[a]lthough courts must be careful not to place too much reliance on such factors [like motive], a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." 491 U.S. at 668. In the present case, respondents Crain, Pittaway, Wing and Whitesides were in direct competition with petitioners. Like the defendants in Harte-Hanks, the respondents here directly benefitted from impugning the

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9 Reproductions of some of this evidence are contained at Appendix pages 1a-19a of this Reply.

reputation of Dr. Gaunt. Respondents Crain, Pittaway, Wing and Whitesides were either reproductive endocrinologists or were seeking that certification. A review of the Record indicates an ongoing "turf battle" between reproductive endocrinologists and anyone else attempting to practice in the field of in-vitro fertilization. Consequently, respondents were clearly biased in favor of their specialization and were bitter rivals against their cross-town competition, Dr. Gaunt, a doctor who was not identically credentialed.

## CONCLUSION

Respondents adjure this Court to grant this Petition for a Writ of Certiorari to correct the North Carolina courts' errant application of the law. Under Gertz, respondents cannot be limited purpose public figures. Even if this Court were to conclude that respondents were limited purpose public figures under Gertz as to a particular public controversy, it would then have to affirm the lower courts' holdings that statements such as "child molester," "absolute criminal," "getting kickbacks," "fraud," and "churning blood studies for economic reasons," were non-actionable matters of "opinion."

This case presents an opportunity for this Court to uphold a citizen's ability to defend his name and reputation, things difficult to restore. The lower courts would benefit from this Court's guidance regarding the proper application of the summary judgment standard under Gertz, Milkovich, and New York Times. If these respondents are allowed to utter, in the name of "opinion" and constitutional privilege, such vile and repugnant falsehoods as have occurred here, then all citizens who embark to further their professions or businesses are in harm's way.

Respectfully submitted, this the 14th day of September, 2001.

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